Patterson-Stevens, Inc. *and* Laborers International Union of North America, Local Union No. 210. Case 3–CA–17899

July 9, 1998

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The principal issue we address in this case[1] is whether the judge correctly found that the conduct of the Respondent's attorney in this compliance proceeding warrants a Board reprimand. The Board has considered the record in light of the exceptions,[2] cross-exceptions,[3] and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this decision and to adopt the recommended Order as modified.

We agree with the judge that the formula used by the General Counsel in calculating the backpay owed to the discriminatees produced a reasonable approximation of the amount due. We further agree with the judge that the formula was appropriate in light of the uncooperative conduct of the Respondent's attorney, Thomas S. Gill, in withholding relevant payroll records from the General Counsel during the backpay investigation and instructing employees of the Respondent not to assist the General Counsel in interpreting the limited financial information that was provided. We do not agree with the judge that Gill's conduct warrants a Board reprimand.

In order to compute the backpay owed to the discriminatees, the General Counsel requested by letter dated June 28, 1995,[5] that Gill assemble for examination the Respondent's ''job lists'' of its various construction jobs during the backpay period as well as the ''date of hire'' records of current and former employees. On June 29, Gill responded by letter that the Respondent ''does not maintain 'date of hire' records for employees.'' Gill did not respond in his letter to the request for job lists. At the hearing, however, Gill introduced the requested job lists as well as W-4 income tax statements of its employees which the judge found were the date of hire records requested by the General Counsel. Hence, the judge concluded that Gill falsely claimed in his letter of June 29 that date of hire records did not exist and ''did not tell . . . the truth'' about the job lists.

Contrary to the judge, we find that Gill did not lie with respect to the job lists in his June 29 letter. In fact, as noted above, the letter failed to respond to the request for job lists. We find no sufficient grounds for discrediting Gill's statement that the lack of response was simply an inadvertent omission. We also find that Gill did not misrepresent the facts about the date of hire records. The W-4 statements that Gill produced at the hearing were not, as the judge found, official date of hire records as specifically requested by the General Counsel. Rather, they were records that indicated when an employee's name first appeared in the Respondent's payroll records. Although the statements would have been useful to the General Counsel and should have been furnished pursuant to his June 28 request, we cannot conclude that Gill falsely asserted that the Respondent did not maintain date of hire records.

[1] On September 5, 1997, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed limited cross-exceptions. The General Counsel and the Charging Party also filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Charging Party filed a motion to strike the Respondent's exceptions and brief for failing to comply with Sec. 102.46(b) and (c) of the Board's Rules and Regulations. We agree with the Charging Party that the Respondent's exceptions and supporting brief do not conform in all particulars with Sec. 102.46(b) and (c). However, we do not find them so deficient as to warrant their rejection and, accordingly, we deny the Charging Party's motion to strike.

The Charging Party also filed a motion to strike an affidavit filed by the Respondent's attorney in support of exceptions, contending that the Respondent improperly seeks to add ''new information and/or purported factual evidence to the record'' after the record was closed. We deny this motion as well. The affidavit simply attests that on the first day of the hearing the Respondent's attorney complied with a General Counsel subpoena for documents which, in fact, were later introduced into evidence at the hearing.

[3] The General Counsel correctly asserts in his limited cross-exceptions that the judge erroneously identified the date on which the compliance specification issued. The specification issued on November 5, 1996, *not* 1995. The General Counsel also correctly asserts that the judge's recommended Order misstates the total backpay amount owed by the Respondent. The correct amount is $127,179, *not* $125,179.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that the judge's actions in this proceeding demonstrate bias against the Respondent. We have carefully reviewed the record and find no basis for a finding of bias.

[5] All dates are in 1995.

We do not condone Gill's conduct in this proceeding. He was without doubt uncooperative and not forthcoming or straightforward. However, we do not find his behavior sufficiently egregious to warrant a Board reprimand on this occasion, as recommended by the judge. Gill has moved that certain statements by the judge underlying his disciplinary recommendation be stricken as ''immaterial, impertinent, and scandalous.'' Although we do not find it necessary to ''strike'' any of this material from the judge's decision, in view of our finding regarding the discipline issue, we do specifically disavow, and do not adopt, the following passages from the judge's decision: the last sentence of the paragraph that begins ''On the first day of the compliance hearing . . .,'' as well as the last sentence immediately preceding this paragraph; the entire paragraph containing the citation to *Joel I. Keiler*, 316 NLRB 763 (1995); and the last sentence immediately preceding the paragraph containing the *Keiler* citation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts opposite their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws:

Anthony Baccaro	$9,336
Kevin Bennett	6,202
Richard Carson	3,413
Angelo Ceccarelli	887
Francesco (Frank) Conidi	5,965
Vincent Conidi	5,890
Thomas Cordova	6,941
Bruce Currin	937
Joseph Ettipio	8,348
Gerald T. Farr	8,147
Thomas Fino	7,924
Stephen D. Fletch	1,711
Anthony Hammil	3,997
Michael Jozak	8,588
David Kelley	9,359
Monroe Leslie	6,941
James J. O'Neill	8,433
Myron Patterson	4,757
Joseph Proietto	10,307
William Rainey	9,096
TOTAL BACKPAY	**$127,179**

Rafael Aybar, Esq., for the General Counsel.
Thomas Gill, Esq. (Saperstan & Day, P.C.), for the Respondent.
James R. LaVaute, Esq. and *Jody Goldman, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. On April 21, 1995, the Board issued its Decision and Order in the above case, 316 NLRB 1278 (1995). The Board found that Patterson Stevens, Inc. (Respondent) had discriminatorily laid off 21 employees because of their membership in, and activities on behalf of Laborers International Union of North America, Local Union No. 210 (the Union) in violation of Section 8(a)(1) and (3).

The Board Order required that Respondent offer immediate reinstatement to the above described employees and make them whole for any losses they suffered as a result of Respondent's unfair labor practices, described above. In addition, the Board ordered the Company to:

> Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

A controversy having arisen over the amount of backpay due under the Board's Order, Region 3 issued a compliance specification dated, November 5, 1995. The compliance specification was amended at the compliance hearing on April 22, 1997, to adjust the interim earnings of discriminatees O'Neill and Hammill.

On December 12, 1996, Respondent filed an answer to General Counsel's compliance specification. In that answer, Respondent did not contest the backpay method used by the Region. Respondent did, however, raise one affirmative defense concerning the operation of an alleged tier and project-only hiring system. On April 22, 1997, Respondent amended its answer to delete three names, Borodzik, Calderon, and Pazzaglia; from its list of ''replacement workers.''

Following the Board's Order in the underlying unfair labor practice case, the Region wrote to Respondent Counsel Thomas Gill, requesting that records be assembled in order for the Region to compute the backpay owed to the discriminatees in this case as well as the companion *Operating Engineers* case.[1] On the morning of June 20, 1995, Compliance Officer Friend and Field Examiner Larkin visited Respondent's office in Tonawanda, New York, to review Respondent's records. At that time, the Region was provided the opportunity to review Respondent's employee payroll records. Although these payroll records covered the backpay period, they only provided limited information, to wit: the employee's wage rate. Nothing else.

As Compliance Officer Friend testified, by reviewing these payroll records it was impossible to determine each employee's job classification (e.g., whether the employees were la-

[1] *Patterson Stevens, Inc.*, 323 NLRB 373 (1997).

borers, cement masons, or operating engineers) and the nature of the work performed. Nor did the payroll records identify the employees' dates of hire, length of service or where the employees worked (e.g., project names or project locations). As Friend testified, the payroll records did not enable him to determine what work was being performed by the employees.

During Friend's and Larkin's June 20, 1995 review of the payroll records, a Respondent representative was present. That representative, however, indicated that he would not be able to answer any of Larkin's and Friend's questions concerning the payroll records or provide any other information. Despite the Respondent's representative indications, Compliance Officer Friend directed questions to the representative concerning the job classifications of the employees. The representative did not answer.

On June 20, 1995, while at the Respondent's offices, Compliance Officer Friend also asked to speak to President Charles Patterson. Friend was told that Patterson was not in the office that day. Due to the limited amount of information in the payroll records, and Respondent's refusal to permit its agent to answer questions about the vague payroll records, Compliance Officer Friend and Field Examiner Larkin left the Company's office at noon on June 20, 1995.

After Friend's and Larkin's June 20, 1995 visit, Friend testified that his office contacted Respondent's counsel, attorney. Specifically, on June 22, 1995, Field Examiner Larkin telephoned attorney Gill and requested that a company agent be present when Friend and Larkin returned to examine the payroll records. Attorney Gill responded that a company agent would not be present and the Region should not ask any questions of anyone from Patterson-Stevens during their next visit. Instead, Attorney Gill advised Friend and Larkin that the Region should submit questions in writing concerning the payroll records and that the Respondent would respond to those questions in writing.

The Region thereafter determined that engaging in this type of question and answer letter writing relay would not be a meaningful or productive way to obtain evidence or conduct its investigation. As Friend testified:

> It was determined that it was difficult, if not impossible, to engage in an exercise of writing the letters back and forth with questions that we would have had. The records were voluminous and it just would not have lent itself to that kind of investigation. We just felt that it was not proper means of getting evidence that we needed at that time.

By letter dated June 18, 1995, to Attorney Gill, Field Examiner Larkin requested that the Company make available for the Region's examination ''its payroll records from January 1, 1992 through the present, the job lists for the period May 28, 1993 to the present, and the dates of hire for all of its employees who were employed at any time during the period January 1, 1993 to the present.'' Larkin also wrote:

> In honor of your request, I will not ask any questions of anyone from Patterson-Stevens while I am examining the records. In this same regard, the Region will not honor your request to put any questions it may have with regard to the records in writing so that you and your client may review them and decide whether to respond. The Region does not have a practice of preparing written interrogatories when it wishes to interview witnesses.

By letter dated June 28, 1995, Attorney Gill responded that Respondent would assemble the payroll records for the Region's review. Respondent, however, did not respond to the Region's request for the Company's job lists. In response to the Region's request for the employees' dates of hire, Attorney Gill wrote:

> Patterson-Stevens, Inc. does not maintain ''date of hire'' records for employees. I have reviewed this question thoroughly with Chuck Patterson, and there is simply no way of determining when an employee first worked for Patterson-Stevens, Inc. Other than to go back through payroll records and find out the first occasion on which that employee's name appears.

In August 1995, Larkin and Friend visited the Company's office to review the payroll records and to record in writing the information for all employees; laborers and operating engineers. At this visit, they were provided the same payroll records as in June 1995 that listed the names of the employees, the number of hours worked by each employee, the number of holiday, vacation and overtime hours, and the employee's wage rate.

The Region had the same problem as on June 20, 1995, determining the job classification of each employee. The Region did not receive any assistance from any Respondent official to interpret the payroll records and was not provided an opportunity to speak to any Respondent official concerning the Region's questions and interpretation of the payroll records. Thereafter, Field Examiner Larkin and Compliance Officer Friend had no choice, but to calculate the discriminatees' gross backpay with the very limited payroll record information provided by Respondent.

Compliance Officer Supervisor Friend testified that the Region believed that the most appropriate method to calculate the discriminatees' backpay under the circumstances, was to use an averaging method of the hours worked by replacement employees during the backpay period. This method called for the Region to calculate the average number of hours worked by those persons it referred to as ''replacement workers'' and then multiply that average by the individual discriminatees' hourly wage rates. Friend testified that since there was no evidence of any type of seniority system, for purpose of his examination and calculations, one ''replacement worker'' was the same as another ''replacement worker.''

Friend testified that the Region used this method because it is a commonly used method that was been found to be appropriate by the Board in other cases, in particular the parallel. *Patterson Stevens Operating Engineers* case, described above. According to Friend, this method gave the Region a very accurate reading of what the discriminatees would have worked had they not been discriminatorily terminated.

As described above, during the Region's review of the employee's payroll records, Friend and Larkin attempted to identify ''replacement workers'' those employees who worked as laborers for Respondent during the backpay period; June 1, 1993, through September 9, 1993. Friend referred to these laborers working during the backpay period

as ''replacement workers''' which he explained at the hearing, as follows:

> JUDGE EDELMAN: What do you mean by replacement employees?
>
> THE WITNESS: By that in our work that we do, we're looking for people that actually worked for the Employer as laborers during the backpay period.

Due to the fact that the payroll record did not indicate the employees' job classifications or the nature of the work performed, Friend relied upon an *Excelsior* list submitted by Respondebt in the above *Operating Engineers*' representation case. Using the *Operating Engineers' Excelsior* list, Friend was able to identify those employees Respondent indicated were operating engineers and then eliminate those individuals as potential laborer ''replacement workers.'' Thus, based upon the limited information known to the Region at the time, all employees not listed on the Respondent's Operating Engineers' *Excelsior* list were replacement laborers. Based upon these circumstances, Respondent's lack of cooperation, the good-faith efforts by the Region to conduct an appropriate compliance investigation, the Region calculated the discriminatees' backpay as set forth in the compliance specification.

Following the Region's calculations of the gross and net backpay, in the manner described above, and pursuant to its usual practice, the Region sent a letter to Respondent seeking payment before the Region issue a formal compliance specification.

By letter dated October 5, 1995, Field Examiner Larkin wrote to Respondent's president, Charles Patterson, concerning the backpay owed by Patterson-Steven. In that letter, the Region explained its averaging method of calculating the discriminatees' gross backpay, net back pay, and listed the discriminatees' interim earnings. Attached to Larkin's October 5, 1995 letter were also exhibits listing those employees the Region determined to be ''replacement laborers'' as well as discriminatee worksheets and summaries of the backpay and interest owed to each of the discriminatees. Larkin concluded his letter inviting Respondent to comment about the Region's calculations and explaining how Respondent should make the backpay payments.

Respondent never responded in Larkin's October 5, 1995 invitation to comment about the Region's calculations despite being given the opportunity to do so. Nor did Respondent remit the backpay. Thus, on November 6, 1996, the Region issued its compliance specification in this case.

I conclude that the Region's method and calculations of the backpay owed to the discriminatees are reasonable and appropriate.

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965). Thus, in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct. *La Favorita*, 313 NLRB 902 (1994), citing *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943).

Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. Id, see also *Kansas Refined Helium Co*., 252 NLRB 1156, 1157 (1980), citing *Iron Workers Local No. 378 (Judson Steel Corp.)*, 227 NLRB 692 (1977); *NLRB v. Brown & Root*, 311 F.2d 447, 453 (8th Cir. 1963). Thus, the Board, or in this matter the Region, is vested with broad discretion in selecting a backpay formula appropriate to the particular circumstances of each case.

Another well-established Board principle is that where there are uncertainties or ambiguities, doubts must be resolved in favor of the wronged party rather than the wrongdoer. *WHLI Radio*, 233 NLRB 326, 329 (1977). As the Board stated in *United Aircraft Corp*., 204 NLRB 1068 (1973), ''the backpay claimant should receive the benefit of any doubt rather than the Respondent, *the wrongdoer responsible for the existence of any uncertainty* and against whom any uncertainty must be resolved.''

I conclude that in the instant matter, the General Counsel's calculations are reasonable and appropriate and must be upheld because: the method selected by the Region to calculate the discriminatees' backpay awards is a formula accepted by the Board, the calculations were reasonable in light of the Respondent refusal to cooperate and/or assist the Region with its compliance investigation; and an and all uncertainty or ambiguity that resulted due to the Respondent's lack of cooperation must be resolved in the discriminatees' favor and against the Respondent.

I also conclude that the Region used a reasonable and Board accepted method to calculate the amount of backpay due to the discriminatees as set forth in the compliance specification. As set forth above, the Region calculated the discriminatees' gross backpay by averaging the number of hours worked by those employees who performed laborers work during the backpay period. The average number of hours worked by the ''replacement workers'' was then multiplied by the individual discriminatee's hourly wage rate set forth in the Union's collective-bargaining agreement.

This method which is referred to as ''Formula Three: the Hours and/or Earnings of Replacement Employees'' averaging method is one of three methods of calculating backpay expressly set forth in Section 10532.4 of the NLRB Casehandling Manual (Part Three), Compliance Proceedings. Thus, it is a Board accepted method of calculating backpay.

This same method was used by the Region and held to be reasonable and appropriate by the Board in the *Operating Engineers* case involving the same Respondent and allowing as in the instant case. There was also the same lack of cooperation, calculated and formulated by Attorney Gill as in the instant case. Therefore, it is clear from the Board's *Operating Engineers*' decision that the method used by the Region in this case is reasonable. Thus, I conclude the calculations of the discriminatees' gross backpay awards as set forth in the compliance specification be upheld.

The Region's method for calculating backpay was also reasonable in light of the total lack of cooperation, by Respondent, directly attributable to attorney Gill. As the record establishes, Respondent refused to assist and/or cooperate with the Region when it conducted its compliance investigation. First, Respondent only provided the Region with employees payroll records that contained limited information despite several requests for additional documentation. Second, Respondent refused to answer the Region's questions

about the payroll records. Thus, in light of this Respondent created and controlled circumstances of the compliance investigation, the Region performed the most reasonable approximations and calculations possible in this matter. Such conduct was pursuant to the express direction of Attorney Gill, pursuant to his calculated plan to obstruct the compliance investigation. Attorney Gill's letters to the Region and his statements during this trial, described below, establish this conclusively. As noted above, according in the Board's Order in the underlying unfair labor practice case, Respondent was ordered to:

> (c) Preserve, and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

Respondent, however, failed to follow this Board order. Instead, Respondent provided the Region with employee payroll records. These payroll records, however, only listed the employee's name, the number of hours worked, the number of vacation, holiday, and overtime hours and the employee's hourly wage rate. The payroll records did not identify the nature of the work performed by each employee. The payroll records did not identify where the hours were worked; e.g., project name or project locations or any other relevant information for the Region's compliance investigation.

Due to the limited information provided in the payroll records, the Region made additional and specific document requests by telephone and written correspondence to Attorney Gill. For example, by letter dated June 28, 1995, Field Examiner Larkin requested additional documentation from Respondent including ''job lists for the period of May 28, 1993 to the present'' and ''dates of hire for all employees.''

Attorney Gill replied by letter dated June 29, 1995, that it did not maintain records concerning their employees' dates of hire and failed to respond to the Region's request for job lists. However, as demonstrated at the compliance hearing, these job lists were readily available. This is one of several instances where Attorney Gill intentionally misled the Region, counsel for the General Counsel, counsel for the Union, and me.

On the first day of the compliance hearing, Respondent offered the Region for the first time documents that appeared to be job lists. These were job lists which Respondent President Patterson claimed were business records created and maintained on a weekly basis, as a normal course of business, by Project Superintendent Darryl Sorrenberger. Respondent President Patterson testified:

> It's prepared usually at the beginning of the week. It details what job we have going and where we're going to be assigning people. And then at the end of the week it's used to verify that everybody's time sheets are in and how many hours they have.

Thus, the Respondent's job lists existed in June 1995, when they were requested by Field Examiner Larkin in her letter to Attorney Gill dated June 28, 1995. Thus, Attorney Gill did not tell Larkin the truth in his June 29 letter.

Again, Respondent's refusal to cooperate with the Region during the compliance investigation was demonstrated when Respondent produced two compilation documents that listed the dates of hire for its employees at the hearing. As set forth above, Attorney Gill by letter dated June 29, 1995, in response to Friend and Larkin's request for the employees' dates of hire wrote:

> Patterson-Stevens, Inc. does not maintain ''date of hire'' records for employees. I have reviewed this question thoroughly with Chuck Patterson, and there is simply no way of determining when an employee first worked for Patterson-Stevens, Inc. Other than to go back through payroll records and find out the first occasion on which that employee's name appears.

Respondent, Attorney Gill, refused to provide or permit any representative from Respondent to answer the Region's questions bout the vague employee payroll records. As the record establishes, the Region on two separate occasions requested that a representative and/or agent from Respondent be available during Compliance Officer Friend and Field Examiner Larkin's review of the payroll records to answer questions about the voluminous documents. On both occasions, Attorney Gill responded that he would not permit Respondent provide an agent or a representative to answer questions. I find such conduct an intentional refusal to cooperate. In fact, the Respondent responded that the Region was not permitted to ask any questions about the payroll records of any Respondent representative. Attorney Gill issued a directive to the Region not to ask any questions of any Respondent representatives whidh the Region document in its letter dated June 28, 1995. The Region, therefore, ws forced to perform its compliance investigation with the limited information provided in the employee payroll records.

Lastly, in addition to not cooperating or assisting the Region with its compliance investigation, Respondent also never commented or responded to the Region's backpay calculations despite being given the opportunity to do so in October 1995. As the record demonstrates, after the Region completed its compliance investigation and backpay calculations, Field Examiner Larkin in a letter dated October 5, 1995, to Respondent President Charles Patterson, explained in detail the Region's method for calculating gross backpay, net backpay, and interim earnings. Attached to Larkin's letter were worksheets for each employee, lists of the ''replacement workers'' identified by the Region, and figures for the interest due and interim earnings for each discriminatee. In that same October 5, 1995 letter, Larkin also invited Respondent to comment upon the Regions' calculations.

Respondent had 13 months to review the Region's calculations and comment about any perceived errors in its backpay calculations, interim earning figures, or selection of replacement workers, backpay calculations, or any other matter.

Respondent's attorney, Gill, was asked why he failed to cooperate in this investigating by me. Attorney Gill's answer is most revealing. In this connection Attorney Gill stated:

> MR. GILL: Well, Your Honor, my opinion is that with the General Counsel who works for the Labor Board right now, a chance of getting a favorable consideration on Employer's issues with regard to compli-

ance specifications is next to nill and the best chance for the Employer is to proceed with the hearing.

JUDGE EDELMAN: Well, that's what you did with the Operating Engineers.

MR. GILL: And will continue to do Your Honor.

I conclude all uncertainty and ambiguity concerning the Region's calculations must be resolved in favor of the discruminatees because Respondent was responsible for the creation and existence of the uncertainty and ambiguity in the instant compliance proceeding. Therefore, I conclude the General Counsel's method for calculating gross backpay and backpay calculations is reasonable.

As set forth above, Respondent was ordered to preserve and provide the Region with the information needed to calculate the backpay owed to the discriminatees. This information was exclusively within Respondent's domain and control. Thus, in light of Board precedent in *United Aircraft Corp.*, supra, all uncertainties must be resolved in the discriminatees' favor because the Company controlled and created the information and the uncertainties concerning the information in this case.

As noted above, Respondent alleged in its Answer as its sole affirmative defense, that it created a tier system for the compliance hearing in order to calculate the average hours worked during the backpay period. According to Respondent affirmative defense alleged in its answer:

> For purpose of calculating the adjusted average hours, Patterson-Stevens had divided the discriminatees into Tier 1, the longest service workers, Tier 2, another group of long service workers and Tier 3, a group of employees hired on a job-by-job basis . . . Tier 1 replacement workers were selected because they were the longest service employees working who are from Laborers International Union of North America Local Union No. 210's (''Local 210'') jurisdiction . . . Tier 2 replacement workers were selected on the same basis as Tier 1. With regard to Tier 3 discriminatees, they were hired because of the NFTA job. . . . and no replacement workers were hired in their stead after the NFTA job shut down.
>
> As the record establishes Respondent's tier system and assertion of a project only hiring system is arbitrary and without merit for several reasons. First, there is no contractual basis for a project-only hiring system. Second, there is no contractual basis for a tier system premised upon length of service. Third, Respondent's assertions concerning the operation of project-only hiring system are refuted by Respondent's action of assigning purported tier 3 discriminatees to various projects other that the Niagara Frontier Transit Authority (NFTA) project. Fourth, the Respondent's argument fails because there was ample work for all the discriminatees and, therefore, the amount of backpay owed in the alleged tier 3 discriminatees would not have been impacted by a purported NFTA project-only hiring system. Fifth, the tier 1 and 2 arguments of Respondent depend upon length of services of the employees service in each tier. Counsel for the General Counsel sought to get the length of services each employee was employed orally and by letter during the investigation, as set forth and described above, without success. Ultimately, the General Counsel subpoenaed such records, but Attorney Gill stated that such records did not exist, however he volunteered that President Patterson remembered the length of service of each employee. I conclude such testimony would be as reliable as playing craps with blank dice and relying on Patterson's recollection as to where the members formerly were.[2] In any event, pursuant to a the General Counsel motion, I precluded taking testimony on this issue.

As to tier 3 there is no contractual basis for Respondent's assertion that it utilized a project-only hiring system tier 3. The collective bargaining between the Union and Respondent does not contain any provision that permits a project-only hiring system. Therefore, Respondent's assertion of a project-only hiring system is contrary to and violative of the agreement, and did not in practice exist.

Article III of the agreement, effective January 1, 1990, through May 31, 1993, sets forth the hiring provisions that were in effect and binding when the Respondent hired the alleged tier 3 discriminatees. Section one provides that:

> The employer shall when requiring Employees, first employ those Employees on the recall list. This recall list will be the names of those Employees having worked for the Employer during the previous 5-year period, commencing June 1, 1990 during which time the employer has been an Employer as defined In Article I and as provided in Article XVI to the effective date of the Agreement. Recalls shall be based on length of service with and individual Employer and the ability of the Employee to do the available work when practical.

If additional employees are required, section 2 of article III provides the procedure to be followed, to wit:

> 2. Should additional employees be required, the following procedure shall be followed.
>
> A. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union, and such selection. And referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership.
>
> B. All such selection and referral shall be in compliance with the procedures set fort below:
>
> (1) The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant for employment shall be registered in the highest priority group for which he qualifies.

Thus, under the terms of the agreement between Respondent and the Union that was effective when the discriminatees were originally hired there was no project-only hiring system.

Since the agreement does not permit a project-only hiring system, I conclude the parole evidence rule precludes Respondent's attempt to argue that it utilized a project-only hir-

[2] Guys and Dolls; dice game between Big Julie from Chicago and Nathan Detroit.

ing policy during the life of the agreement. Therefore, under the terms of the agreement in place when the discriminatees were hired, they were not hired as temporary (NFTA project-only) employees. *Alamo Cement Co*., 298 NLRB 638, 642–643 and fn. 2 (1990). There is no contractual basis for a project-only hiring system and, thus, no merit in the Company's assertion of a project-only hiring system.

During Respondent's case, Attorney Gill attempted to introduce evidence that some of the discriminatees were engaged in a strike during the backpay period. Counsel for the Union moved to preclude such testimony on the ground that it was not set forth as an affirmative defense. I granted such motion.

Section 102.56(b) and (c) of the Board's Rules and Regulations provide in relevant part:

> (b) Contents of answer to specification. The answer shall specifically admit, deny, or explain each and every allegation of the specification unless the Respondent is without knowledge, in which case the Respondent shall so state, such statement operating s a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. . . . As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, *the answer shall specifically state the basis for such disagreement*, setting forth in detail the Respondent's position as to the applicable premises and furnishing the appropriate supporting figures. [Emphasis added.]
>
> (c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of compliance specification— . . . if the Respondent files an answer to the specification that fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent shall be precluded from introducing any evidence controverting the allegation.

Also instructive is the Board's decision in *Laborers Local 158 (Worthy Bros.)*, 280 NLRB 11100 (1986), where it held as follows:

> Respondent may not contest the formula based on its foremen's hours contention since it did not raise the matter in its answer. See Section 102.56(b) and (c) of the Board's Rules and Regulations, *Airport Service Lines*, 231 NLRB 1272, 1273 (1977); *Baumgardner Co*., 298 NLRB 26 (1990).

Accordingly, I affirm my ruling that precluded Respondent from presenting such testimony. *Teamsters Local 469 (Coastal Tank Lines)*, 323 NLRB 210 (1997).[3]

At another point in Respondent's case, Attorney Gill attempted to present testimony that hours worked by ''replacement workers'' outside the Union's geographic jurisdiction, should not be included in the computation of backpay. Both counsel for the Union and the General Counsel moved to preclude such testimony on the basis that it should have been alleged as an affirmative defense. I allowed such evidence to be received and ruled that I would decide the motion in my decision. As set forth above, Section 102.56(b) of the Board's Rules and Regulations, the Company's required to specifically set forth any and all bases for its dispute with and/or denial of the contents of the compliance specification. In addition, the Company is also required to set forth the Company's position and the applicable information that it possesses regarding the disputed matter. In this matter, Respondent did not allege as an affirmative defense, the issue of geographic jurisdiction in its Answer despite the fact that this purported defense was within its control and knowledge.

Moreover, according to Section 102.56(c) of the Board's Rules and Regulations, if the Respondent's answer to the compliance specification does not meet the requirements of Section 102.56(b), Respondent shall be precluded from introducing any evidence controverting an allegation in the compliance specification. In particular, Section 102.56(c) of the Board's Rules and Regulations states, in pertinent part:

> If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, *and the respondent shall be precluded from introducing any evidence controverting the allegation.*

(Emphasis added.) In the matter, Respondent failed to set forth its argument concerning work hours outside the Union's geographic jurisdiction in its Answer as an affirmative defense to the compliance specification. Therefore, according to Board Rule and Regulation Section 102.56(c), I conclude Respondent should be precluded from raising this issue for consideration and introducing evidence concerning the geographic location of it's projects. Therefore, I grant the above motion to preclude.

Moreover, Respondent had numerous opportunities to raise this issue before and after the issuance of the compliance specification to the Region.[4] Respondent cannot now surprise the Region with the argument in light of the circumstances of the compliance investigation and the Board's Rules and Regulations.

Attorney Gill contended that the issue he was raising, was that the General Counsel contented all of these people were ''replacement workers; but that the General Counsel didn't

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[3] Even if Respondent would have been allowed to present evidence regarding its argument that the discriminatees engaged in a strike, Respondent's argument still fails on its merits. In this regard, the Board has held that when a discriminatee has been unlawfully terminated, and a strike or lockout occurs during the backpay period, gross backpay normally accrues during the period of the strike or lockout. *Hill Transportation Co*., 102 NLRB 1015 (1953). Similarly, when discriminatees have been unlawfully locked out, backpay continues to accrue even though the discriminatees declare a strike during the lockout. *Someret Shoe Co*., 12 NLRB 1057 (1939).

[4] In addition to not raising the geographic jurisdiction argument in its answer, Respondent did not attempt to amend its Answer to include this argument despite ample opportunity to do so.

say why they were ''replacement workers.'' Therefore, he did not have to state in is answer why they were not ''replacement workers.'' Attorney Gill than went on to state: ''[W]e listed specifically the people that we thought should be considered replacement workers. We didn't explain why we thought those people were more representative to the General Counsel anymore than he explained why his people were replacement workers.'' I find Attorney Gill's contention entirely disengenuous. It was Respondent, pursuant to Attorney Gill's calculated and deliberate instructions to his client that rendered it impossible for the General Counsel, to obtain, what was an expanded job classification was, e.g., whether the employees were laborers, cement masons, or operating engineers and the nature of the work performed. Nor did the period records identify the employees' dates of hire, length of service or where the employees worked; project names of project locations. The General Counsel was unable to define ''replacement workers'' because Attorney Gill deliberbly refused to supply the information necessary for such deffirmation. Attorney Gill is indeed a Buffalo trickster.

I find atorney Gill's conduct throughout the investigation and trial of this worthy of a reprimand. I conclude his entire course of conduct throughout the investigation stage, and the trial was a blatent, premeditated attempt to obstruct and delay the Boards process, somewhat sleazy, and deserving of a Board reprimand. *Joel I. Keiler*, 316 NLRB 763 766–769 (1995).

Respondent also contended that the Region's ''replacement workers'' were not per se replacement workers because these employees were hired prior to May 31, 1993. For purposes of this case the terms ''replacement worker'' means those employees performing laborers work during the backpay period. The term ''replacement worker'' is not limited to the Respondent's ''new hires,'' i.e., those employees hired on /or after June 2, 1993, as Respondent suggested at the hearing.

The term ''replacement employee'' and/or ''replacement worker'' and its distinction from ''new hire'' for purposes of a compliance investigation was clearly addressed in the underlying unfair labor practice case. In particular, Administrative Law Judge Roth held in his Recommended Order to the Board that.

> It is undisputed that beginning on June 2, the Company used replacement employees, including new hires, and company employees transferred from outside of the Union's territorial jurisdiction.

Thus, it is clear from the underlying unfair labor practice case that the term ''replacement employee'' and/or ''replacement worker'' is district from ''new hire.'' Therefore, the fact that some of the ''replacement workers'' included in the Region's calculations were hired prior to May 31, 1993, does not mean that they are not replacement workers for purposes of calculating the discriminatees' backpay.

Accordingly, I conclude the Region's inclusion of hours worked by ''replacement workers'' who were hired prior to May 31, 1993, is correct. I reject Respondent's contention.

Respondent contends that warehouse work hours should be excluded from backpay. The evidence establishes that warehouse work hours were properly included in the Region's compliance specification because warehouse work hours were work hours previously assigned to the discriminatees prior to their unlawful termination. Therefore, the warehouse work was work that could have continued to have been performed by the discriminatees during the backpay period.

In fact, the evidence establishes that union employees were offen assigned to the warehouse prior to the expiration of the Agreement and their termination in May 1993. Respondent President Patterson admitted to this during cross-examination. Patterson's testimony established that the union members were frequently assigned to the warehouse, not just ''on occasion.'' For example, discriminatees William Rainey, Stephen Fletch, Kevin Bennett, Frank Conidi, Richard Carson, Anthony Hammill, James O'Neill, and Anthony Bacarro all worked in the warehouse prior to May 28, 1993.

Additionally, Patterson testified that for purposes of salary and benefits, all warehouse work was treated as laborers (Union) work. As Patterson testified, it was the Respondent's practice to pay all employees as specified in the agreement for the hours worked in the warehouse.

Finally, the warehouse is physically located within the Union's jurisdiction. The warehouse is located in Erie County on Respondent's premises in Patterson, testified the warehouse is where Respondent keeps large equipment and ''miscellaneous things'' that are needed on construction job sites. Therefore, since the warehouse is within the geographic jurisdiction of the Union and it is where union laborers perform what is laborers work, it is properly included in the Region's backpay calculations in this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholding required by Federal and state laws.

Anthony Baccaro	$9,336
Kevin Bennett	6,202
Richard Carson	3,413
Angelo Ceccarelli	887
Francesco (Frank) Conidi	5,965
Vincent Conidi	5,890
Thomas Cordova	6,941
Bruce Currin	937

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] At the trial counsel for the General Counsel amended the compliance specification in order to accurately reflect the amount of backpay owing to Anthony Hammill and James J. O'Neill. In this regard, counsel for the General Counsel amended the compliance specification allege that Hammill incurred expenses while working for an interim employer and that such expenses were deducted from Hammill's interim earnings for the second quarter of 1993, the quarter in which they were incurred. In addition, counsel for the General Counsel amended paragraph 10 of the compliance specification to correctly reflect that the amount of backpay owing to Hammill is $3997 and to O'Neill is $8433.

Joseph Ettipio	8,348	Monroe Leslie	6,941
Gerald T. Farr	8,147	James J. O'Neill	8,433
Thomas Fino	7,924	Myron Patterson	4,757
Stephen D. Fletch	1,711	Joseph Proietto	10,307
Anthony Hammill	3,997	William Rainey	9,096[6]
Michael Jozak	8,588		
David Kelley	9,359	**Total BackPay**	**$125,179**